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No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

MARY DIORIO,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT WITH ATTACHED APPENDIX

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QUESTION PRESENTED

Whether, in a case where the credibility of the prosecution's principal witnesses was critical to the petitioner's guilt or innocence, the trial court unduly restricted petitioner's right to impeach the credibility of those witnesses, thereby violating her Sixth and Fourteenth Amendment rights to confront and cross-examine adverse witnesses?

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OCTOBER TERM, 1987

MARY DIORIO,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The petitioner, Mary Diorio, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the Appellate Court of the State of Connecticut, rendered on August 18, 1987 and September 16, 1987.

OPINIONS BELOW

The opinion of the Appellate Court of Connecticut on petitioner's direct appeal is officially reported at 12 Conn. App. 74. The opinion is unofficially reported at 529 A.2d 1320, and is reprinted in the Appendix to this petition, at pp. 1A–17A.

The petitioner's motion for reargument or reconsideration was denied by the Appellate Court of Connecticut, without opinion, on September 16, 1987. A copy of that order is reproduced in the Appendix to this petition at p. 18A. Petitioner thereafter filed a petition to the Supreme Court of Connecticut, seeking certification for review of the Appellate Court judgment. The Supreme Court of Connecticut denied the petition for certification, without opinion, on October 21, 1987. *State v. Dioria*, 205 Conn. 813, 532 A.2d 587. A copy of that order is reproduced in the Appendix at p. 19A.

JURISDICTION

The judgment of the Appellate Court of Connecticut was entered on August 18, 1987, and petitioner's timely motion for reargument or reconsideration was denied by the Appellate Court of Connecticut on September 16, 1987. Petitioner's timely petition for certification for review to the Supreme Court of Connecticut was denied on October 21, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), on the grounds that the State of Connecticut has violated the petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: ". . . ; nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

Section 53a-8 of the Connecticut General Statutes, entitled "Criminal liability for acts of another," provides as follows: "A person acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

Section 53a-181 of the Connecticut General Statutes, entitled "Breach of peace: Class B misdemeanor," provides as follows:

> (a) A person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or his property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public, hazardous or physically offensive condition by any act which he is not licensed or privileged to do.
>
> (b) Breach of peace is a class B misdemeanor.

STATEMENT OF THE CASE

After a trial to a state jury in 1985, petitioner Mary Diorio was convicted of aiding and abetting the crime of breach of peace, in violation of Connecticut General Statutes §§ 53a-8 and 53a-181.[1] As a result of that conviction, petitioner was sentenced on May 16, 1985, to the following: a term of imprisonment of one hundred and twenty days, execution suspended after thirty days, to be served on ten successive weekends, a fine of one thousand ($1000) dollars, a two-year period of probation, and not less than two hundred hours of community service.

The petitioner appealed, and on August 18, 1987, the Appellate Court of Connecticut affirmed her conviction. *State v. Diorio*, 12 Conn. App. 74, 529 A.2d 1320. The petitioner's motion for reargument or reconsideration in the Appellate Court of Connecticut was denied on September 16, 1987. On October 21, 1987, the Supreme Court of Connecticut denied petitioner's petition for certification for review. *State v. Diorio*, 205 Conn. 813, 532 A.2d 587.

In this petition, petitioner seeks review of a single question: Whether, in a case where the credibility of the prosecution's principal witnesses was critical to the petitioner's guilt or innocence, the trial court unduly restricted petitioner's right to impeach the credibility of those witnesses, thereby violating her Sixth and Fourteenth Amendment rights to confront and cross-examine adverse witnesses?

I. State Trial Proceedings

The petitioner's prosecution arose from a "pie in the face" incident which occurred at a junior high school graduation

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[1] The defendant was also charged with, and acquitted of, the crimes of tampering with a witness, in violation of Connecticut General Statutes § 53a-151, and bribery of a witness, in violation of Connecticut General Statutes § 53a-149a.

exercise in Fairfield, Connecticut, on June 25, 1984. The pie was thrown at the dean of students by one Robert Fuller, a/k/a "Tickles" the clown.

The basic facts of the incident are set out in the opinion of the Appellate Court of Connecticut, at 12 Conn. App. 75–76:

> The jury could reasonably have found certain relevant facts. The defendant's daughter was a member of the graduating class of a junior high school. Prior to graduation, the dean of students at the school had disciplined the defendant's daughter. Seeking revenge,[2] the defendant hired and paid one Robert Fuller to dress as a clown at graduation and throw a pie in the face of the dean of students. The dean was hit with a cream pie in front of between one thousand and two thousand people.

Stated briefly, it was the prosecution's theory that petitioner had aided and abetted the crime of breach of peace by hiring Mr. Fuller to throw the pie at the dean of students.[3] With regard to the felony charges on which petitioner was acquitted, it had been the state's theory that the petitioner and her husband[4] attempted to induce Mr. Fuller not to divulge the identity of the person who hired him to throw the pie.

At trial, the primary disputed issue was the identity of the petitioner as the person who solicited Fuller's pie-throwing service. The prosecution's proof on the identity issue rested almost exclusively on the testimony of Fuller — who freely admitted throwing the pie while dressed as "Tickles" the clown — and one Donald Bello. Fuller and Bello were homosexual

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[2] The "revenge" motive was refuted by the testimony of the school principal, who testified that petitioner told him it would be advisable to keep her daughter on disciplinary probation to improve her schoolwork.

[3] Mr. Fuller was not arrested for throwing the pie.

[4] Petitioner's husband was and is a practicing attorney in Connecticut.

lovers who lived together and who had been involved in joint business ventures. At the time in question, they were co-owners of a business known as the Fun Factory,[5] which was located near the junior high school where the incident occurred.

With regard to the identity question, the following excerpt from the Appellate Court's opinion is relevant:

> Shortly after the incident, the [petitioner] voluntarily gave a statement to the police in which she denied having hired the clown to throw the pie at the victim. At trial, that statement was introduced as evidence. The clown testified that the [petitioner] and her husband had telephoned his store to inquire about his services, and that the [petitioner] later entered his store, ordered the pie throwing as part of the graduation ceremonies, and paid him for the service. He identified her for the police at a place where she was, or had been employed, and he identified her at trial. The [petitioner's] niece testified, and stated that the [petitioner] had admitted to being responsible for the incident. The niece further testified that the [petitioner] and her husband had offered her five hundred dollars to assume responsibility for the incident, and as part of that plan had taken her to have her hair frosted in order to resemble the [petitioner] more closely. Although the [petitioner] did not testify at trial, her husband did and stated that neither he nor his wife had hired the clown.
>
> *State v. Diorio, supra*, 12 Conn. App. at 83-84

The defense evidence cast serious doubt on Fuller's identification testimony. The state had presented evidence that on June 26, 1984, at the request of the police, Fuller went to

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[5] The Fun Factory offered a variety of services, including balloon deliveries, singing telegrams, costume deliveries, and "pie in the face" services.

the Fairfield Medical Laboratory where the petitioner formerly worked. He did not initially see the defendant there, but when he returned an hour later, he saw her in the office. The defense refuted this evidence through the testimony of the laboratory manager and a former co-worker of petitioner. Their testimony established that petitioner terminated her employment there on February 15, 1984 — four months prior to the date on which Fuller claimed to have seen her there.

It should also be noted that petitioner's niece, referred to in the above excerpt, admitted at trial that *she* had previously acknowledged responsibility for the pie-throwing incident. The niece's brother also testified, and he confirmed the fact that his sister admitted having told petitioner that she, the petitioner's niece, was responsible for the incident.

Because the identification testimony of Fuller and Bello was critical to the prosecution's case, the major thrust of the defense case was aimed at impeaching their credibility. Toward that end, the defense called several individuals who had had professional business dealings with Fuller, Bello, or both of them. These witnesses testified that, based on reputation or personal opinion, Fuller and Bello were not truthful people.

Beyond that, the defense was completely frustrated in its attempt to impeach Fuller and Bello during cross-examination. At a hearing held outside the presence of the jury, the defense made an extended offer of proof on a wide variety of impeachment material which it was seeking to utilize during cross-examination of the two men. That offer of proof encompassed prior acts of misconduct relating to veracity and matters relating to bias and motive. The trial court ruled against the defense with regard to *all* of the offered impeachment material. The particulars are described below.

A. Prior Misconduct Evidence

The petitioner attempted to cross-examine Fuller about five acts of prior misconduct in order to impeach his credibility. Reduced to essentials, the proffered misconduct evidence indicated that Fuller had: (1) engaged in fraudulent and deceptive practices in connection with a summer camp which he ran in 1976; (2) engaged in fraud and false advertising in connection with a summer stock playhouse he ran in 1982; (3) committed thefts and made a false criminal complaint in 1980 or 1981; (4) embezzled from a camp in 1981; and (5) solicited contributions through false and misleading representations. The specifications of the prior misconduct evidence, as set forth by defense counsel in his offer of proof, are as follows:

1. Misconduct Act #1: The New York Camp

In 1976, Robert Fuller ran a summer camp in New York called The Berkshire Showcase. In connection therewith, Fuller was accused civilly of making false, deceptive and misleading claims about the camp. The Attorney General of New York obtained a civil judgment against Fuller for $33,000 in penalties and $11,000 in restitution to parents of campers. In addition, Fuller was permanently enjoined "from conducting business in a persistently fraudulent and illegal manner and from operating a summer camp unless he has posted a $200,000 bond to secure refunds for customers." (Def. Ex. 4 for Identification).[6]

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[6] At several times during the offer of proof hearing, the defense introduced, for identification purposes, documents relating to the specific acts of misconduct. No claim was made that the documents themselves were admissible. Rather, their purpose was to show the trial court that there was a legitimate and good faith basis for inquiry about the acts in question.

2. Misconduct Act #2: The Maine Camp

In 1982, Fuller ran the Centerstage Theatre — billed as "America's Only Summer Stock Playhouse For Teens" — in Maine. On July 20, 1982, midway through the summer, the theatre camp closed; the staff was not paid, and the 39 campers had to be temporarily housed at the county jail. A lawsuit brought by parents alleged that Fuller acted fraudulently in that he never intended to run the camp for the whole summer. It was also claimed (1) that Fuller put tuition payments in bank accounts under other names to insulate the funds from legal process; (2) that in advertising for the camp he held himself out as "hold[ing] a B.A. degree in theatre education";[7] and (3) that he accumulated large advertising bills which he didn't pay. (Def. Ex. 5 for Identification).

3. Misconduct Act #3: The Frenchwoods Camp

In 1980 or 1981, Fuller was hired to work at Frenchwoods Camp in Callicoon, New York. He had been hired by Ronald Schaefer, the owner of the camp. While employed there, Fuller began a liaison with a 17-year-old boy, stole $600 from a safe containing the campers' canteen money, and stole a camp vehicle. When subsequently confronted about the $600 theft, Fuller faked a heart attack. A few days later, when Schaefer again demanded the money, Fuller and the 17-year-old swore out a false criminal complaint against Schaefer for molesting and sodomizing the youth. Schaefer was arrested. Fuller than went to Schaefer and offered to have the charges dropped if Schaefer would agree that a $25,000 deposit (which Fuller had borrowed from Schaefer to purchase a camp) would be refunded to Fuller. Schaefer later won a suit against the state for false arrest. (Def. Ex. 6 for Identification).

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[7] Fuller had already testified, on cross-examination, that he never received any post high school degree. He also asserted that he never held himself out, in any type of advertisement, as having a degree, but Def. Ex. 5 for Identification clearly shows otherwise. See App. p. 20A.

4. Misconduct Act #4: The Hartford Camp

In 1981, Fuller went to work as a camp director in Hartford. He was hired by Ben Schlifman, owner of a Weight Watchers Franchise. Fuller had complete charge of all the checkbooks, and he embezzled over $23,000 from the camp. When confronted by Mr. Schlifman, Fuller signed a statement acknowledging the theft and agreeing to repay it. However, Fuller then disappeared, and Mr. Schlifman desired to press charges. (Def. Ex. 7 for Identification).

5. Misconduct Act #5: The Chamber of Commerce

During cross-examination, Fuller was asked whether he had ever misrepresented to potential donors that a particular business activity of his was endorsed or sponsored by the Chamber of Commerce:

> Q Did you represent to potential donors in an effort to raise money for that [business] activity that you were — that it *was in accordance with the Chamber of Commerce*?
>
> A *No.*
>
> Q That you were in fact a member of the Chamber of Commerce?
>
> A No. That we were a member, yes. *That it was endorsed, no.* (emphasis added)

In a subsequent offer of proof, counsel indicated that he desired "to question [the witness] further" about his involvement with the Chamber. In support of his request, counsel introduced for identification a newspaper article from the Bridgeport Post (dated Nov. 6, 1984) which indicated (1) that the Fun Factory had used the Chamber's name without authorization in soliciting contributions for a children's Halloween party; and (2) that several contributors had been misled. (Def. Ex. 8 for Identification).

6. Offer of Proof: The Nolled Charges

Defense counsel also sought permission to question Fuller about two "bad check" charges, the prosecution of which had been resolved by entry of a nolle prosequi on December 20, 1984 (a date between the time of the defendant's arrest and her trial). Counsel did not claim that the "bad check" charges, which arose in Fairfield, constituted specific acts of misconduct. Rather, he claimed that the nolles went to the witness' bias and motive for testifying, i.e., they may have represented a *quid pro quo* for Fuller's testimony at defendant's trial. Counsel argued that since a nolle can be "reopened" within thirteen months, those charges were still pending, and counsel was therefore entitled to question the witness about them.

7. Cross-Examination of Donald Bello

Donald Bello was Fuller's partner in the Fun Factory. On cross-examination, Bello testified that he and Fuller had been involved in previous business endeavors, and that they had been homosexual lovers for several years. The following questioning then occurred:

Q So you love Mr. Fuller. Is that not correct?

A Yes.

Q And do you love him maybe as much or more than anyone else?

A I would guess so.

Q Okay. And if Mr. Fuller needed you to do certain things to help him out, *you would help him out would you not?*

A *If it was legal, yes.*

Q *And if it was illegal.*

A *I wouldn't do it.*

Q So there are certain things that you wouldn't do even though you love him a great deal, if not more than anyone else in the world. Is that right?

A Yes.

Q And if he *asked you to make a statement to help him* maybe seven months[8] after something had happened to *something that you in fact did not witness, would you to that for him?*

A *No way.* (emphasis added).

At a subsequent point in the cross-examination, the jury was excused, and defense counsel advised the court of his intention to cross-examine the witness about a particular act of misconduct: In October of 1982, both Bello and Fuller pleaded guilty to misdemeanor charges arising out of a fraudulent food stamp scheme. Bello had been employed by a municipality, and he was illegally dispensing food stamps to Robert Fuller. On October 7, 1982, Fuller pleaded guilty to larceny in the third degree, and Bello pleaded guilty to aiding and abetting larceny in the third degree. Both men were placed on probation and ordered to make restitution. (Def. Ex. 13A and 14 for Identification).

As noted earlier, the trial court precluded the defense from using any of the impeachment material described above.

In prohibiting the defense from utilizing any of the prior misconduct evidence (#s 1 through 5 above), the trial court

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[8] Bello testified that he was present on June 26th when petitioner and her husband allegedly came to the store to induce Fuller not to divulge the identity of the person who hired him. But Bello never told anyone that he was present at the June 26th conversation until he gave a statement to the police on February 5, 1985, approximately seven months later.

ruled that the acts in question were, *inter alia*, remote in time, were not supported by sufficient evidence, and did not have sufficient probative value concerning veracity to outweigh their prejudicial effect.

The trial court also ruled that unless counsel could "substantiate a claim that there had been any offer of leniency [to Fuller]," counsel was foreclosed from inquiring about the nolled "bad check" charges (#6 above) since (1) they were not pending when Fuller gave his statement to the police; (2) they were not pending at the time of petitioner's trial; and (3) the charges did not result in a felony conviction.

Finally, with respect to the cross-examination of Bello regarding his complicity in the food stamp scheme (#7 above), the trial court ruled that the evidence in question did not sufficiently demonstrate the witness' bias, motive, or partiality.

One final point: At the trial, both sides agreed that the case essentially turned on the credibility of Fuller. During argument on a mistrial motion, the prosecutor described Fuller as the "key state's witness," whose "*credibility* was obviously *the most important issue in this case*," and whose "*credibility* [was] *absolutely essential* to a determination by the jury of the innocence or guilt of this defendant." (emphasis added). And in defense counsel's opening statement to the jury, he asserted that "the only witness whose *testimony is going to be crucial to their case is the testimony of the clown . . . after you've heard the clown testify if you feel that you question his truth and voracity,* (sic) *you feel that his testimony is less than credible, he's been less than candid with you,* you can't prove everything he said, and you have one, just a reasonable doubt, that you find Mary Diorio innocent." (emphasis added).

II. State Appellate Proceedings

On direct appeal, the petitioner claimed that the trial court had unduly restricted her right fully and effectively to cross-examine the principal witnesses against her. This claim was predicated primarily[9] on the petitioner's Sixth and Fourteenth Amendment rights to confront and cross-examine adverse witnesses. Because trial counsel did not expressly claim that all the limitations on cross-examination violated the petitioner's confrontation rights, appellate counsel sought review of the constitutional claim pursuant to *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). That case permits review of newly raised errors "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." The Appellate Court considered and rejected the petitioner's federal constitutional claim. *State v. Diorio, supra*, at 12 Conn. App. 76–79.

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[9] Petitioner also claimed a violation of her state constitutional rights "to be confronted by the witnesses against [her] . . ." Connecticut Constitution, Article First, § 8. The petitioner's claim on appeal also had a subsidiary evidentiary component: *if* the petitioner's constitutional rights had not been abridged by the trial court's rulings, then the trial court's rulings constituted an abuse of discretion.

REASONS FOR GRANTING THE WRIT

This case falls squarely within the second of the two "broad categories" of Confrontation Clause cases that have been addressed by this Court, i.e., a case "involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer,* 474 U.S. 15, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985); *Kentucky v. Stincer,* 482 U.S. ____, 107 S.Ct. 2658, 2663, 96 L.Ed.2d 631 (1987). It is a case which merits review by grant of certiorari, because the Connecticut Appellate Court "has decided a federal question in a way in conflict with applicable decisions of this Court." U.S. Sup. Ct. R. 17.1(c).

The federal question involved here is the Sixth Amendment right of confrontation, which is applicable to state proceedings through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). "[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination"; *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Kentucky v. Stincer, supra,* 2662; and cross-examination, in turn, "is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Cross-examination has been described as "essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer, supra,* 2662; *Lee v. Illinois,* 476 U.S. ____, 106 S.Ct. 2056, 90 L.Ed.2d 514, 525–26 (1986). Toward the achievement of that objective, "the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Davis v. Alaska, supra,* 316; *Delaware v. Fensterer, supra,* 294; *see, e.g., Pennsylvania v. Ritchie,* 480 U.S. ____, 107 S.Ct. 989, 999, 94 L.Ed.2d 40 (1987) ("right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable"); *Berger v. California,* 393 U.S. 314, 315, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969) ("one of the

important objects of the right of controntation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses"); *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 751 L.Ed. 624 (1931) (a "permissible purpose" of cross-examination is to elicit facts "tending to discredit the witness by showing that his testimony in chief was untrue or biased . . ."); *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (where credibility of witness in issue, trial court may not cut off, at the threshold, cross-examination aimed at " 'exposing falsehood and bringing out the truth' "); *District of Columbia v. Clawans*, 300 U.S. 617, 632, 57 S.Ct. 660, 81 L.Ed. 843 (1937) ("the prevention . . . of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error"); *The Ottawa v. Stewart*, 3 Wall. (70 U.S.) 268, 18 L.Ed. 165 (1865) (right of cross-examination is "a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, . . . and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness; . . .").

Petitioner recognizes that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall, supra*, 1435; *Alford v. United States, supra*, 694 ("extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court"); *Gordon v. United States*, 344 U.S. 414, 422–23, 73 S.Ct. 369, 97 L.Ed. 447 (1953) (discretion when "dealing with collateral evidence as to character"). Nevertheless, "this principle [of discretion in controlling cross-examination] cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." *Id.*, 423.

It has been observed that "[in the case of a limitation, rather than a denial, of cross-examination . . . no clear line separates evidentiary discretion from constitutional error." Note, Confrontation, Cross-Examination, And The Right to Prepare A Defense, 56 Geo. L.J. 939, 961–62 (May 1968). Yet, despite the frequent absence of a "bright line," this Court has not hesitated to find a constitutional violation when that line, however indistinct, has been crossed. *See, e.g., Smith v. Illinois, supra; Alford v. United States, supra; Davis v. Alaska, supra,* and n.6 (noting that *Alford v. United States* was a holding of "constitutional dimension"); *Delaware v. Van Arsdall, supra.* The boundary line between evidentiary and constitutional error was transgressed in this case, because the trial court did not permit cross-examination that was sufficient to satisfy the requirements of the Sixth Amendment. The impeachment material which petitioner sought to utilize at trial was of two general types: evidence tending to show bias, motive, or partiality; and evidence of prior misconduct bearing on the issue of veracity. Because somewhat different considerations apply, these two categories of impeachment evidence are discussed separately below.

A. Bias, Motive, and Partiality

Davis v. Alaska, supra, makes clear that cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand"; *Id.,* 316; may not readily be precluded. "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' " *Id.; see United States v. Abel,* 469 U.S. 45, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony."). Moreover, ". . . the exposure of a witness' motivation in testifying is a proper and important function of the

constitutionally protected right of cross-examination." *Id.*, 316-17; *Delaware v. Van Arsdall, supra,* 1435.

In prohibiting petitioner from cross-examining Fuller about the nolle prosequi of two unrelated charges, the trial court impermissibly interfered with petitioner's ability to demonstrate Fuller's bias or motive. The record shows that those nolles were entered on December 20, 1984 — *after* the pie incident, the petitioner's arrest (July 12, 1984), and Fuller's written statement to the police (June 26, 1984) — but just three months *before* the petitioner's trial in March of 1985.[10] The Appellate Court upheld the trial court's ruling on this proposed line of inquiry because the "charges were not pending either at the time Fuller gave his statement to the police or at the time of the [petitioner]'s trial." *State v. Diorio, supra,* 12 Conn. App. at 77.[11]

Under Connecticut law, "[t]he effect of a nolle prosequi is to end pending proceedings without an acquittal and without placing the defendant in jeopardy . . . (citations omitted) . . . . Although the entry of a nolle prosequi results in the defendant's release from custody, he can, within thirteen months; General Statutes § 54-142a(c); be tried again upon a new information and a new arrest." *State v. Lloyd,* 185 Conn. 199, 201, 440 A.2d 867 (1981). The "decision to initiate a nolle prosequi still rests with the state's attorney . . .". *Id.,* 202.

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[10]The Appellate Court's opinion inaccurately states that the nolles occurred "six months prior to the pie incident." 12 Conn. App. at 76. Counsel for petitioner pointed out this inaccuracy in his motion for reargument or reconsideration, and the state, in responding to that motion, agreed that the Appellate Court was in error with regard to the timing of the nolle.

[11]There is no question that, if the bad check charges had been "pending" when Fuller testified at petitioner's trial, the defense would have had the right to cross-examine him about the charges. *State v. Harris,* 10 Conn. App. 217, 235, 522 A.2d 323 (1987) ("a pending criminal charge is probative on the issue of the witness' credibility").

It is clear from the foregoing that Fuller was subject to re-prosecution for the bad check charges for a period of thirteen months, commencing on December 20, 1984. And *that* decision was in the hands of the prosecutorial office in the same judicial district where the petitioner was tried.

State statutes or rules, or technical distinctions as to whether a nolled charge is "pending," cannot be allowed to emasculate a criminal defendant's right to explore the possible bias or motive of a chief prosecution witness. *See generally, Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed.2d 297 (1973) (state "voucher rule" cannot prevent cross-examination to impeach own witness; substantive right cannot be governed by "technicality or by any narrow and unrealistic definition of the word 'against' "); *Davis v. Alaska, supra* (state provisions protecting confidentiality of juvenile offender records held to violate defendant's confrontation rights); *Delaware v. Van Arsdall, supra* (trial court ruling, based on state evidence rule, held to violate defendant's confrontation rights).

Delaware v. Van Arsdall, supra, is highly instructive on this point. There, this Court agreed that the defendant's rights under the Confrontation Clause had been violated when a trial judge prevented the defendant from questioning a prosecution witness "about the dismissal of a criminal charge against him — being drunk on a highway — after he had agreed to speak with the prosecutor about [the victim's] murder." *Id.,* 1434. To be sure, the witness "acknowledged that the drunkenness charge had been dropped in exchange for his promise to speak with the prosecutor about the murder, but he denied that the agreement had affected his testimony." *Id.,* 1434. Because the trial court ruling "prohibited *all* inquiry into the possibility that [the witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge"; and because the "jury might reasonably have found [that the dismissal] furnished the witness a motive for favoring the prosecution in his testimony"; the trial court's ruling violated the defendant's confrontation rights. *Id.,* 1435.

In this case, although "counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Davis v. Alaska, supra,* 318.

With respect to the cross-examination of Donald Bello, the proffered line of inquiry was highly relevant to demonstrate Bello's bias and partiality. *See State v. Asherman,* 193 Conn. 695, 720, 478 A.2d 227, cert. denied, 470 U.S. 1050, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1984) (cross-examination to demonstrate bias due to relationship of witness to a party "is a matter of right which may not be unduly restricted" and "[t]his may also be true in many cases involving *the relationship of witnesses to each other.*"). (Emphasis added.) *See also United States v. Abel, supra* (evidence that defendant and defense witness were members of prison gang, whose tenets required members to " 'lie, cheat, steal [and] kill' to protect each other," was probative of witness' possible bias and admissible). Here, the fact that Bello had aided his partner in an illegal scheme would certainly have undermined the credibility of his testimony which corroborated that of Fuller. Moreover, Bello's participation in the fraudulent scheme directly contradicted his testimony (quoted, *supra,* at pp. 11-12) that he would not do anything "illegal" to help out his partner.

On the critical issues of bias, motive, and partiality,

> defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[es].
>
> *Davis v. Alaska, supra,* 318

Because petitioner's counsel was denied that opportunity — and the constitutional standard was therefore not met — this Court should grant the writ of certiorari.

B. Prior Misconduct Evidence

Under Connecticut law, "[a] witness may be impeached during cross-examination by specific acts of misconduct which bear a special significance upon the issue of veracity." *State v. Diorio, supra,* 77–78. *See* Fed. R.Evid. 608(b); McCormick on Evidence (3rd Ed. 1984) § 42. In connection with this claim, three factors must be noted at the outset.

First, the acts of misconduct in question were classic, veracity-related acts. They encompassed acts of larceny, fraud, misrepresentation, and deceit — the kinds of acts which bear a "special significance upon the issue of veracity . . ." *State v. Orsini,* 187 Conn. 264, 268, 445 A.2d 887, cert. denied, 459 U.S. 861, 103 S.Ct. 136, 74 L.Ed.2d 116 (1982); *Gordon v. United States,* 383 F.2d 936, 940 (D.C. Cir. 1967) ("[i]n common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects on a man's honesty and integrity.").

Second, this was not a case where defense counsel was blindly taking "pot shots" at a witness, hoping one would land. Defense counsel introduced a substantial amount of documentary material designed to demonstrate that there was a legitimate and good faith factual basis for the proposed lines of cross-examination.

Third, the acts of misconduct were not remote in time. One act of misconduct had occurred nine years before trial (1976); the other acts of misconduct were, respectively, 1 year old (1984); 3 years old (1982); and 4–5 years old (1980–81 and 1981). Furthermore, this was not a situation where the defendant sought to cross-examine a witness on a single act of dishonesty which " 'occurred long before and has been followed by a legally blameless life . . .' " *State v. Nardini,* 187 Conn. 513, 525, 447 A.2d 396 (1982).

To the state's anticipated response to the "misconduct" claim — that it was purely a discretionary matter for the trial court — petitioner offers the following observation. The

restrictions on cross-examination of Fuller rose to the level of a constitutional deprivation because (1) he was a " 'key' government witness . . . who may have possessed 'substantial reason to cooperate with the government' "; *State v. Gaynor,* 182 Conn. 501, 509 n.7, 435 A.2d 1022 (1980) (citing federal cases); and (2) the proffered impeachment evidence was not cumulative. Although a trial court has "a duty to protect [a witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him"; "no obligation is imposed on the court . . . *to protect a witness from being discredited* on cross-examination . . .". (Emphasis added.) *Alford v. United States, supra,* 694; *Davis v. Alaska, supra,* 320 (quoting *Alford*). Here, the trial court's rulings protected the "witness from being discredited on cross-examination," but utterly failed to protect the constitutionally-secured confrontation right of the person being tried.[12] For this reason, a grant of certiorari is warranted.

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[12]As a result of the trial court's rulings, the defense was effectively precluded from impeaching the credibility of an undoubtedly impeach*able* witness. Fuller's cross-examination impeachment was limited to one prior inconsistent statement — for which he offered an explanation — and an admission that he made one mistake in his testimony. Bello's impeachment, if any, consisted of a single prior inconsistent statement.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgments and opinion of the Appellate Court of Connecticut.

RESPECTFULLY SUBMITTED,

MARY DIORIO, Petitioner

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No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

MARY DIORIO,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* MARY DIORIO
(4244)

DUPONT, C. J., DALY and BIELUCH, Js.

Convicted of the crime of aiding and abetting a breach of the peace, the defendant appealed to this court. The charge against the defendant arose out of an incident in which she allegedly hired another individual to dress as a clown and to throw a pie in the face of the dean of students at the junior high school graduation of the defendant's daughter. *Held:*

1. The defendant could not prevail on her claims that the trial court erred in unconstitutionally restricting her cross-examination of the state's principal witness concerning bias, prior acts of misconduct and prior convictions.
2. The trial court did not err in instructing the jury with respect to the crime of being an accessory to breach of the peace; the defendant's claim to the contrary notwithstanding, being an accessory to breach of the peace is a cognizable crime under Connecticut law.
3. The defendant's claim that the trial court erred in not instructing the jurors that in reaching a verdict they must unanimously agree on the method of committing the crime charged was unavailing under the circumstances here; the evidence presented at trial did not permit significant disagreement as to what conduct the defendant had committed.
4. The defendant's challenge to the trial court's charge to the jury on the use of circumstantial evidence and the inferences to be drawn therefrom was unavailing; under the circumstances here, where the principal factual issue to be determined by the jury was the identity of the person who solicited the pie throwing services, it was not reasonably possible that the jury was misled by that charge.
5. The defendant's claim to the contrary notwithstanding, the trial court's instructions concerning reasonable doubt as related to one's activities fairly conveyed the applicable rule of law to the jury, and no harmful error was evidenced by that court's failure to use the specific words requested by the defendant.
6. The evidence presented was sufficient to support a finding that the defendant intended to do harm to the victim.

Argued March 31—decision released August 18, 1987

Information charging the defendant with the crimes of tampering with a witness, breach of the peace and bribery, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Burns, J.*; verdict and judgment of guilty of breach of the peace, from which the defendant appealed to this court. *No error.*

Richard Emanuel, for the appellant (defendant).

James A. Killen, deputy assistant state's attorney, with whom, on the brief, were *James G. Clark* and *Scott Murphy,* for the appellee (state).

DUPONT, C. J. The defendant appeals from a judgment of conviction, following a jury trial, of aiding and abetting a breach of the peace, in violation of General Statutes §§ 53a-8 and 53a-181.[1] The defendant claims that the trial court erred (1) by impermissibly restricting her cross-examination of the state's witnesses, (2) by instructing the jury on an offense not cognizable under Connecticut law, (3) by denying the defendant her right to a unanimous jury verdict, (4) by its charge to the jury on circumstantial evidence, (5) by its charge to the jury on reasonable doubt, and (6) in failing to grant the defendant's motion for judgment of acquittal.

The jury could reasonably have found certain relevant facts. The defendant's daughter was a member of the graduating class of a junior high school. Prior to graduation, the dean of students at the school had disciplined the defendant's daughter. Seeking revenge, the defendant hired and paid one Robert Fuller to dress as a clown at graduation and throw a pie in the face

[1] The defendant was also charged with, and acquitted of, the crimes of tampering with a witness, in violation of General Statutes § 53a-151, and bribery of a witness, in violation of General Statutes § 53a-149a.

of the dean of students. The dean was hit with a cream pie in front of between one thousand and two thousand people.

I

The defendant first claims that the trial court erred by unconstitutionally restricting her cross-examination of the state's witness concerning bias, prior acts of misconduct and prior convictions.

A

BIAS

At trial, the defendant attempted to cross-examine Fuller concerning an improper motive for his testimony. The defendant alleged that Fuller's testimony was in return for the nolle of unrelated charges against him six months prior to the pie incident. The defendant also attempted to cross-examine Fuller's business partner concerning bias or motive stemming from a prior plea of guilty to a misdemeanor. The trial judge prohibited cross-examination in both instances.

The right of an accused effectively to cross-examine an adverse witness is embodied in the confrontation clause of the sixth amendment. *Davis* v. *Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State* v. *Heinz*, 3 Conn. App. 80, 85–86, 485 A.2d 1321 (1984). A claim of undue restriction on cross-examination ordinarily involves a two-pronged analysis: (1) whether the constitutional standard has been met, and (2) if so, whether the court nonetheless abused its discretion. *State* v. *Heinz*, supra, 86. "The constitutional standard is met when defense counsel is 'permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.' " *State* v. *Gaynor*, 182 Conn. 501, 509, 438 A.2d 749 (1980), quoting *Davis* v. *Alaska*, supra, 318.

The constitutional standard was met in this case. The defendant was permitted to question Fuller at length regarding any deals made in exchange for his testimony. The trial judge restricted cross-examination regarding the nolled charges, however, since these charges were not pending either at the time Fuller gave his statement to the police or at the time of the defendant's trial. Similarly, the defendant was allowed to cross-examine Fuller's business partner extensively as to any bias stemming from the latter's close relationship with Fuller. Hence, the defendant was " 'permitted to expose to the jury the fact from which the jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " *State* v. *Gaynor*, supra.

This leaves the remaining question of whether the trial court abused its discretion in restricting the scope of cross-examination. " 'To establish an abuse of discretion, appellants must show that the restrictions imposed upon their cross-examination were clearly prejudicial.' " *State* v. *Gaynor*, supra, 510. Our review of the transcript indicates that the defendant was not prejudiced. The defendant was permitted the opportunity to cross-examine the state's witness extensively regarding bias or improper motive. When the right to cross-examine to demonstrate bias, motive, or prejudice is not altogether denied, the scope and extent of the cross-examination rests in the court's discretion. *State* v. *Shipman*, 195 Conn. 160, 163, 486 A.2d 1130 (1985); *State* v. *Luzzi*, 147 Conn. 40, 46–47, 156 A.2d 505 (1959). The trial court did not abuse its discretion.

B

PRIOR ACTS OF MISCONDUCT

The defendant attempted to cross-examine the state's principal witness concerning five acts of prior misconduct in order to impeach his credibility. A witness may be impeached during cross-examination by specific acts

of misconduct which bear a special significance upon the issue of veracity. *State* v. *Martin,* 201 Conn. 74, 85–86, 513 A.2d 116 (1986); *State* v. *Horton,* 8 Conn. App. 376, 380, 513 A.2d 168, cert. denied, 201 Conn. 813, 517 A.2d 631 (1986). It does not follow, however, that if the acts inquired about are indicative of a lack of veracity, the court must permit the cross-examination. Whether to permit it lies largely within the court's discretion. *State* v. *Roma,* 199 Conn. 110, 117, 505 A.2d 717 (1986); *Vogel* v. *Sylvester,* 198 Conn. 666, 675–76, 174 A.2d 122 (1961). Our review of the record indicates that the trial court did not abuse its discretion in denying the cross-examination. The trial court held a hearing at which defense counsel argued at length for the opportunity to conduct cross-examination concerning the prior acts of misconduct. The court ruled that the acts were, inter alia, remote in time, had a tendency to confuse the jury, were not supported by sufficient evidence, and did not have probative value concerning veracity sufficient to outweigh the potential for prejudicial effect. We agree with its findings and conclude that under these circumstances, the court did not abuse its discretion in restricting cross-examination.

C

PRIOR CONVICTIONS

The defendant claims as error the trial court's denial of his cross-examination of the state's principal witness regarding prior criminal convictions. The Connecticut Supreme Court has interpreted General Statutes § 52-145[2] as permitting the use of a witness' prior con-

[2] General Statutes § 52-145 provides in pertinent part: "(a) A person shall not be disqualified as a witness in any action because of, (1) his interest in the outcome of the action as a party or otherwise, (2) his disbelief in the existence of a supreme being, or (3) his conviction of crime. (b) A person's interest in the outcome of the action or his conviction of crime may be shown for purpose of affecting his credibility."

viction to impeach credibility where the conviction was for a crime punishable by imprisonment in excess of one year. *State* v. *Geyer*, 194 Conn. 1, 10, 480 A.2d 489 (1984). The defendant was unable to demonstrate any convictions by the witness which were punishable by imprisonment for more than one year. Consequently, the trial court did not err in denying cross-examination concerning prior criminal convictions.

II

The defendant next claims that the trial court erred by instructing the jury on an offense, accessory to breach of the peace, which is not cognizable under Connecticut law. The defendant argues that conviction as an accessory[3] requires proof of intent to commit the substantive crime. Since breach of the peace may be committed by either intentional or reckless conduct,[4] the defendant asserts that the offense is not cognizable because a breach of the peace may be committed recklessly but the accessory must still be shown to have intended the outcome.

General Statutes § 53a-8 requires that a defendant have the *mental state required for the commission of a crime* while intentionally aiding another. "[A]n

[3] General Statutes § 53a-8 provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

[4] General Statutes § 53a-181 provides: "(a) A person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or his property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public, hazardous or physically offensive condition by any act which he is not licensed or privileged to do.

accessory may be liable in aiding another if he acts intentionally, knowingly, recklessly or with criminal negligence toward the result, depending on the mental state required by the substantive crime." *State* v. *Foster*, 202 Conn. 520, 531, 522 A.2d 277 (1987). One may be an accessory to a crime without having a conscious objective to cause the result described by a statute defining the crime. Id. Thus, a person may be held liable as an accessory to a reckless act—in this instance, breach of the peace—if he has the requisite culpable mental state—recklessness—for the commission of the substantive offense, and he intentionally aids another in the crime. Therefore, we find that being an accessory to a breach of the peace is a cognizable crime under Connecticut law. The trial court did not err in instructing the jury with respect to the crime.

III

The defendant's third claim of error is the trial court's failure to instruct the jury to require that its verdict be unanimous when considering alternatively stated elements of the breach of the peace charge. The defendant did not request such a charge at trial, nor did she enter an objection and exception to the instructions given. We have, however, previously reviewed similar claims concerning jury unanimity not raised at trial pursuant to *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576 (1973), and will do so here. See *State* v. *Milledge*, 8 Conn. App. 119, 122–23, 511 A.2d 366 (1986); *State* v. *Benite*, 6 Conn. App. 667, 671, 507 A.2d 478 (1986); *State* v. *Wist*, 3 Conn. App. 650, 654, 491 A.2d 428, cert. denied, 196 Conn. 810, 494 A.2d 906 (1985).

The sixth amendment to the United States constitution guarantees a defendant in a criminal case the right to a unanimous verdict if her jury, as here, con-

sists of only six members. *Burch* v. *Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979). The defendant argues that the trial court's instruction to the jury that it could convict the defendant on the basis of subsection (2) of General Statutes § 53a-181 ("assaults or strikes another") or, in the alternative, subsection (6) ("creates a public, hazardous, or physically offensive condition by any act which he is not licensed or privileged to do") indicates that the jury may have agreed that the defendant committed a breach of the peace but may have disagreed as to which subsection was violated. This possibility, the defendant asserts, deprived her of her right to a unanimous jury verdict. We disagree.

"If the actions necessary to constitute a violation of one statute or subsection of a statute are distinct from those necessary to constitute a violation of another, then jurors who disagree on which one the state proves cannot be deemed to agree on the actus reus: the conduct the defendant committed. Where the evidence presented supports both alternatives, the possibility that the jurors may actually disagree on which alternative, if either, the defendant violated is the highest. Under such circumstances, the jurors should be told that they must unanimously agree on the same alternative. We do not now hold that that kind of charge . . . must always be given. Rather, such a charge is required only where a trial court charges a jury that the commission of any one of several alternative actions would subject a defendant to criminal liability, and those actions are conceptually distinct from each other, and the state has presented some evidence supporting each alternative. The determination of whether actions are conceptually distinct must be made with reference to the purpose behind the proposed charge: to ensure that the jurors are in unanimous agreement as to what conduct the defendant committed." *State* v. *Benite*, supra, 674–75.

The state presented evidence to demonstrate that the defendant was accessorily responsible for only one act: the throwing of the pie into the face of the dean. While some of the jurors might have believed that the pie incident violated subsection (6) of General Statutes § 53a-181 by creating a public, hazardous or physically offensive condition, they could not have reached this conclusion without first believing that the pie was actually thrown, in violation of subsection (2). See *State* v. *Jones*, 193 Conn. 70, 76–77, 475 A.2d 1087 (1984). In other words, the jury could only have found that the defendant created a public, physically offensive condition by striking the dean of students with the pie. Thus, the evidence presented at trial did not permit significant disagreement as to what conduct the defendant committed.

IV

The defendant also claims that the trial court erred in its charge to the jury on the use of circumstantial evidence, and the inferences to be drawn therefrom.[5]

[5] In its general instructions, the court charged the jury that: "By the evidence I mean not only the testimony of the witnesses which you heard, but also the exhibits which will be provided to you in the jury room. And any reasonable inferences which you may draw from either the testimony or from the exhibits, you may draw reasonable inferences from the established facts in the case. The inference which you draw, however, must not be from a guess on the evidence or a surmise upon the evidence, but it must be from a fact which the evidence has established. And I think you may recall that during the course of the trial I may have referred to that matter as well and it is the facts which must be presented to you and it is on the facts as presented to you that you must make your decision.

"Inferences that you may draw from these established facts must be logical and reasonable and well founded upon facts which have been proven in the trial of the case."

In charging the jury on the elements of tampering with a witness, in violation of General Statutes § 53a-151, the court stated: "What the defendant's intent was in this respect is subject to proof just as in any other fact in the case. In determining what the person's intent was at any given time, in addition to the direct evidence which you would have before you, you may infer intent from what the person's conduct was at the time and what

The court, in its charge to the jury on tampering with a witness and bribery of a witness, stated that inferences to be drawn be "strong enough so that you can find" that "it is more probable than not that the inference being drawn is true."

The facts pertinent to the defendant's claim of error are as follows: Shortly after the incident, the defendant voluntarily gave a statement to the police in which she denied having hired the clown to throw the pie at the victim. At trial, that statement was introduced as evidence. The clown testified that the defendant and her husband had telephoned his store to inquire about his services, and that the defendant later entered his store, ordered the pie throwing as part of the graduation ceremonies, and paid him for the service. He identified her for the police at a place where she was, or

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the circumstances were surrounding that conduct. Such an inference may be drawn provided two elements are satisfied.

"The first is that the conduct of the defendant at the time and the circumstances surrounding such conduct from which you are being asked to draw an inference have themselves been proven beyond a reasonable doubt, and secondly, that the inference asked to be drawn is not only logical and reasonable, but it is strong enough so that you can find that it is *probable, more probable than not that the fact that you are asked to infer is true.*" (Emphasis added.)

The court then charged the jury on the elements of the crime of bribery of a witness, a violation of General Statutes § 53a-149a, and stated: "The defendant's intent is to subject to proof just as any other fact in the case. In determining what is her intent was at the time of the issue you may in addition to any direct testimony, infer from what the defendant's conduct was at the time or from what the circumstances were concerning that conduct and you may make such an inference provided that you are satisfied, one, that the conduct of the defendant and the circumstances surrounding such conduct had been proven beyond a reasonable doubt, two, that the making of such an inference is not only logical and reasonable, but is strong enough so that you can find that it is *more probable than not that the inference being drawn is true.*

"If you find that the State has failed to prove beyond a reasonable doubt any one of the elements on which you have been instructed, you will find the defendant not guilty."

had been employed, and he identified her at trial. The defendant's niece testified, and stated that the defendant had admitted to being responsible for the incident. The niece further testified that the defendant and her husband had offered her five hundred dollars to assume responsibility for the incident, and as part of that plan, had taken her to have her hair frosted in order to resemble the defendant more closely. Although the defendant did not testify at trial, her husband did and stated that neither he nor his wife had hired the clown.

In the recent past, despite the failure of a defendant to object and except to similar erroneous instructions at trial, such claims of error, under the "exceptional circumstances" doctrine of *State* v. *Evans*, 165 Conn. 61, 327 A.2d 576 (1973), have been reviewed. *State* v. *Mullings*, 202 Conn. 1, 12–14, 519 A.2d 58 (1987); *State* v. *Whelan*, 200 Conn. 743, 756, 513 A.2d 86, cert. denied , U.S. , 107 S. Ct. 597, 93 L. Ed. 2d 1598; (1986); *State* v. *Sullivan*, 11 Conn. App. 80, 94, 525 A.2d 1353 (1987). Such review is appropriate "where the defendant can demonstrate the deprivation of a fundamental constitutional right and a fair trial. *State* v. *Preyer*, 198 Conn. 190, 196–97, 502 A.2d 858 (1985)." *State* v. *Whelan*, supra. The record in this case is adequate to support the contention that the defendant's claim is reviewable under the *Evans* doctrine. See *State* v. *Robinson*, 204 Conn. 207, 210 n.4, A.2d (1987).

Our review of the record in this case, however, fails to support the defendant's claim that the court's charge, which related to the use of circumstantial evidence to infer intent, clearly deprived her of a "fundamental constitutional right and a fair trial." *State* v. *Evans*, supra, 70. It is by now well established that such a charge, when given once as part of a general charge where the principal factual issue is identity, will rarely if ever lead to the conclusion that it is reason-

ably possible that the jury was misled as to the state's burden of proving every element of the crime beyond a reasonable doubt. *State* v. *Miller,* 202 Conn. 463, 491–92, 522 A.2d 249 (1987); *State* v. *Reddick,* 197 Conn. 115, 132–33, 496 A.2d 466 (1985), cert. denied, U.S. , 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986).

Here, the principal factual issue to be determined by the jury was the identity of the person who solicited the pie throwing services. That element was established primarily by the testimony of the clown who, as an eyewitness, identified the defendant. This testimony of the defendant's identity as the solicitor of the clown's services was a matter of direct evidence, and required no inference drawing by the jury. *State* v. *Sullivan,* supra, 97. The testimony of the niece, which related the defendant's admission of her responsibility for the incident, was likewise evidence that the defendant had solicited the clown's services. The niece's further testimony about the offer of money to her and the hair frosting, if believed, was circumstantial evidence from which the inference of the defendant's solicitation could be drawn. Id.

In this case, the language complained of was charged only with respect to the proof of intent of the two crimes of which the defendant was acquitted. That charge was not given to the jury with respect to the proof of the elements of the crime of which she was convicted, nor was an erroneous general charge on circumstantial evidence and inferences given. The record reveals that in this case the element of intent was undisputed by the defendant throughout the course of the trial. The defense consisted of an attempt to discredit the state's witnesses who testified about the defendant's involvement by showing their bias and motives, and in so doing to destroy the state's proof of the identity of the defendant as the perpetrator of the crimes charged. The charge on the use of circum-

stantial evidence and the drawing of inferences was limited in its use to the issue of intent, was not related to any other element of the crimes charged, and was unrelated to the issue of identity. We conclude, therefore, that it is not reasonably possible that the jury was misled by this charge.

V

The defendant next claims that the trial court erred in its charge to the jury on reasonable doubt.[6] She argues that the court erred (1) by charging the jury that "[a] reasonable doubt is a doubt for which a valid reason can be assigned," and (2) by not charging the jury, as she requested, that "a reasonable doubt is the kind of doubt that would make you hesitate to act."[7] Although she did not preserve the first claim at trial, she now seeks a full review under *State* v. *Evans*, supra, 70, in reliance upon the review granted to such a claim in *State* v. *Findlay*, 198 Conn. 328, 502 A.2d 921, cert. denied, U.S. , 106 S. Ct. 2279, 90 L. Ed. 2d 721 (1986).

[6] The court charged the jury on the concept of reasonable doubt as follows: "Now the phrase 'reasonable doubt' has no technical or unusual meaning. You can arrive at the real meaning of it by emphasizing the word 'reasonable.' *A reasonable doubt is a doubt for which a valid reason can be assigned.* It is a doubt that is something more than a guess or a surmise. It is not a conjecture or fanciful or captious doubt. A reasonable doubt is not a doubt which is raised by someone simply for the sake of raising doubts, nor is it a doubt suggested by the ingenuity of counsel or a juror which is not warranted by the evidence. A reasonable doubt in other words is a real doubt, an honest doubt, a doubt which has its foundation in the evidence or in the lack of the evidence. It is such a doubt as in the serious affairs which concern you in everyday life you would pay some heed to." (Emphasis added.)

[7] The defendant's request to charge on the hesitation to act relied upon *Johnson* v. *Louisiana*, 406 U.S 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), and states: "A reasonable doubt is the kind of doubt that would make you hesitate to act in pursuing the most important affairs of your life. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character as to cause you not to hesitate in the most important of your affairs."

The defendant's challenge to the language "a doubt for which a valid reason can be assigned" in the context of a reasonable doubt charge is essentially identical to both the charge and challenge brought previously to our Supreme Court in *State* v. *Findlay*, supra, 346 n.14.

In order to determine whether the defendant's claim is reviewable under the *Evans* doctrine we must answer two questions in the affirmative. The first is does the defendant raise an issue which by its terms implicates a fundamental constitutional right, and the second is can we conclude, upon a limited review of the record, that the claim is truly of constitutional proportions, or is only characterized as such by the defendant. *State* v. *Thurman*, 10 Conn. App. 302, 306–307, 523 A.2d 891 (1987). "In those instances in which our Supreme Court or this court has already clearly indicated that the particular claim is or is not of constitutional proportions and therefore reviewable or not reviewable, a summary 'yes' or 'no' answer may be sufficient." Id., 307. The defendant's claim here implicates a fundamental constitutional right; *State* v. *Findlay*, supra, 345–48; but it does not thereby automatically qualify for a full scale appellate review. *State* v. *Thurman*, supra, 306–307; see also *State* v. *Farrar*, 7 Conn. App. 149, 153 n.3, 508 A.2d 49, cert. denied, 200 Conn. 805, 512 A.2d 229 (1986); *State* v. *Cosby*, 6 Conn. App. 164, 172, 504 A.2d 1071 (1986).

Our limited review of the record reveals that this claim is characterized by the defendant as being of constitutional proportions, but is not truly of such proportion. The language of this charge was held in *Findlay* not to be a deprivation of a constitutional right. Thus, we may summarily answer the second question of our *Evans* analysis with a "no," and conclude that this claim does not qualify for further review. See *State* v. *Thurman*, supra. Preserving *Evans* as a narrow bypass

serves to ensure that claims which might require reversal will be raised at trial, permitting their timely correction, thereby avoiding "needless multiple proceedings which are neither in the defendant's nor the public's interest, and which contribute to the economic waste of court congestion. *State* v. *Kurvin*, 186 Conn. 555, 563-66, 442 A.2d 1327 (1982); *State* v. *Torrence*, 1 Conn. App. 697, 704-705, 483 A.2d 622 (1984), aff'd, 196 Conn. 430, 493 A.2d 865 (1985)." *State* v. *Cosby*, supra, 173.

The defendant's second claim, that the trial court committed harmful error by failing to charge the jury with "hesitate to act" language, was preserved by the defendant by her request to charge. Practice Book § 852. That claim, however, is equally unavailing. The defendant is not entitled to a charge comprised of exactly the words she requests. *State* v. *Estep*, 186 Conn. 648, 653, 443 A.2d 483 (1982). The court's instruction regarding the concept of a reasonable doubt as affecting one's daily activities fairly conveyed the point to the jury. The charge on this point, reviewed in light of the instruction as a whole, was adequate to guide the jury and protect against injustice. No harmful error is evidenced by the failure to use the words requested by the defendant. *State* v. *Estep*, supra, 652.

VI

The defendant's final claim is that the evidence was insufficient to establish her guilt beyond a reasonable doubt. The claim of insufficient evidence was raised by the defendant's motion for judgment of acquittal at the close of the state's case, and by her motion to set aside the verdict. The defendant claims that the charge as given allowed the jury to consider the subsections in the alternative and that the evidence was insufficient on both subsections (2) and (6) of General Statutes § 53a-181 as charged to the jury. The defendant did not

object to the charge to the jury on either subsection on the ground that the evidence was insufficient to support a conviction. The defendant also neglected to request a jury poll after the verdict to clarify the basis of the defendant's conviction.

In these circumstances, where the defendant has not taken steps to clarify which subsection she was convicted under, the conviction will be upheld if the evidence is sufficient under either subsection. *State* v. *Duhan*, 194 Conn. 347, 353–55, 481 A.2d 48 (1984). The evidence presented at trial is viewed in a light most favorable to sustaining the verdict. *State* v. *Leavitt*, 8 Conn. App. 517, 523, 513 A.2d 744 (1986). On review, we must determine whether " '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *State* v. *Scielzo*, 190 Conn. 191, 197, 460 A.2d 951 (1983); quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The jury was charged, in part, with respect to subsection (2) of the statute, that "striking" another is "the intentional use of force or violence on the person of another," and that "the striking must be accompanied with an intent to do harm." The defendant contends that the evidence adduced at trial fails to support a finding that the defendant intended to do harm to the victim. While harm is not defined in the penal code, it is, in common usage defined as "physical or mental damage" by Webster, Third New International Dictionary; and as "to damage; injure; impair" by the New College Edition of the American Heritage Dictionary (1981).

With respect to subsection (6), the jury was instructed that a "physically offensive" condition "refers to matter, material, or substance which is revolting, disgusting, or repugnant." A material which is repugnant is

one which is "distasteful to a high degree: exciting distaste or aversion." Webster Third New International Dictionary.

The facts which the jury could reasonably have found from the evidence introduced at trial are that the victim was hit in the face by a pie, which caused his vision to be blurred and a burning sensation to be felt in his eyes for several hours afterward, as well as shock and embarrassment from the event. This evidence clearly supports a finding that by use of force his vision was impaired, and that he suffered some degree of physical damage. The evidence of being struck by a pie in the face in front of somewhere between one and two thousand people, and the testimony of embarrassment and humilitation suffered, is sufficient to uphold a rational trier's finding that the incident was thus highly distasteful, and would cause distaste or aversion to a reasonable person. Thus, the evidence was sufficient to sustain the conviction not only under one subsection, as is required here, but under both subsections of the statute. Compare *State* v. *Duhan*, supra, 353–55; with *State* v. *Marino*, 190 Conn. 639, 650–51, 462 A.2d 1021 (1983).

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT
APPELLATE COURT

AC 4244

STATE OF CONNECTICUT

V. : SEPTEMBER 16, 1987

MARY DIORIO

ORDER

THE MOTION OF THE DEFENDANT, FILED AUGUST 28, 1987, FOR REARGUMENT OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

/s/ Patricia J. Friedle
ASSISTANT CLERK — APPELLATE

NOTICE SENT: 9-16-87
Richard Emanuel
James Clark, A.S.A.
James Killen, D.A.S.A.
Fairfield at GA2, (CR2-76693)
Hon. Robert P. Burns
Emily J. Lebovitz

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-87-1053

State of Connecticut

v.

Mary Diorio

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (12 Conn. App. 74) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/ Alan M. Gannuscio
Assistant Clerk — Appellate

Dated: October 21, 1987.

Notice to: 10/21/87
Clerk, Superior Court, Fairfield at GA 2, CR2-76693
Clerk, Appellate Court
Richard Emanuel
James G. Clark, A.S.A.
James Killen, D.A.S.A.

Richard Emanuel in support of petition — *James A. Killen, Deputy Assistant State's Attorney* in opposition.

DEFENDANT'S EXHIBIT 5 FOR IDENTIFICATION (EXCERPT)

Robert B. Fuller, PROGRAM DIRECTOR

Mr. Fuller holds a B.A. degree in theatre education. He is formerly a television actor who has made over 30 commercials. He has appeared on numerous TV shows and for several years portrayed Ronald McDonald, the national clown character for McDonald's Corp. He has studied with many well-known celebrities and at the Neighborhood Playhouse in NYC. He is also a youth worker and for sometime counseled teenagers at a temporary youth shelter. He grew up as a camper and has had many years in camp administration. He has received numerous awards for his work with retarded children and has been written up in "Who's Who in the East." He is a member of the American Camping Association.